

IN THE HIGH COURT OF BOMBAY AT GOA, PANAJI-GOA

**SECOND APPEAL NO. 137 OF 2005
AND
CIVIL APPLICATION NO. 294 OF 2005**

1. Shri Uttam Rama Simepurushkar (dec.);
and his deceased wife:
 2. Smt. Vijaya Uttam Simepurushkar (dec.),
both through their legal heirs:-
 - (a) Shri Dattaram alias Gurudas Uttam
Simepurushkar
 - (b) Shri Somnath Uttam Shimepurushkar;
 - (c) Shri Pradosh Uttam Shimepurushkar;
 - (d) Kum. Prafulla Uttam Shimepurushkar
 - (e) Kum. Nirmala Uttam Shimepurushkar;
 - (f) Kum. Sudha Uttam Shimepurushkar;
 - (g) Kum. Nutan Uttam Shimepurushkar
- All residents of Moicowaddo, Pilerne, Bardez-Goa. Appellants

Versus

Shri Joao Patricia V. D'Souza,
son of Vitorino L.S.N. D'Souza,
Indian National, married, major,
service, resident of House No.58,
Pilerne, Moicowaddo, Pilerne,
Bardez-Goa. Respondent

Shri Rohit Bras De Sa, Advocate for the Appellants.
Shri S.D. Lotlikar, Sr. Advocate with Mrs. Shambhavi Rao, Advocate for
Respondents.

CORAM: P.V. KAKADE, J.
DATE: **8th August, 2006**

ORAL ORDER

Heard the learned Counsel for both the parties. Perused the
records.

2. The unsuccessful defendant has filed this appeal against the judgment and order passed by Ad-hoc Additional District Judge, Mapusa dated 04/06/2005 dismissing the appeal and confirming the judgment and order passed by Civil Judge, Senior Division, Mapusa dated 28/07/2004 decreeing the suit of the plaintiff thereby issuing direction to the defendant to demolish the fencing raised by him in the suit property.

3. The respondent-plaintiff came with the case that there is property bearing Survey No. 141/21 in the Village of Pilerne, Bardez. By sale deed dated 24/10/1985, he purchased the undivided half share of the property. The adjoining property bearing Survey No. 141/20 belonged to the defendant and in between the said property there was fencing of Adoshe plants. In the first week of November 1985 defendants removed the fencing and encroached upon the suit property to the extent of 50 square meters and also planted coconut saplings, mango saplings etc. Hence the suit came to be filed for removal of encroachment.

4. The defendants challenged the allegations made by the plaintiff on various grounds inter alia denying the statement that they had encroached upon the said property and sought dismissal of the suit.

5. On the basis of available pleadings and evidence on record, the learned trial Judge came to the conclusion that the plaintiff had proved his ownership and possession of the suit property and further that the defendant had encroached in the suit property and as such the suit came to be decreed. The appeal was carried to the District Court and learned appellate Court after hearing both the parties dismissed the appeal.

Hence the present appeal.

6. At the out set, it may be noted that learned Counsel for the appellant/defendant has submitted that there was no application by the plaintiff while filing the suit under Order 7 Rule 3 of the Civil Procedure Code as per Bombay Amendment whereby it is provided that where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers. In case of encroachment a sketch showing as approximately as possibly the location and extent of encroachment shall also be filed alongwith the plaint.

7. Relying on this particular provision, the Counsel for the appellant submitted that the suit was liable to be dismissed on the ground that the said mandatory provision was not complied with and prejudice was caused to the defendant to meet the plaintiff's case for want of proper identification of the suit property which was alleged to have been encroached upon. In this regard, I must note that no doubt that the provision is made in the Civil Procedure Code for the purpose of identification of the property so as to avoid any prejudice to the other side to meet the case in appropriate manner. However, by no stretch of imagination it can be said that it is a mandatory provision especially when the lacuna of such nature can be rectified by order of the Court on request by party or by Court itself suo moto which in fact has been done in the present case. Learned Trial Judge appears to have seen the said lacuna and has directed for appointment of Court Commissioner whose report was relied upon in order to hold that there was encroachment as alleged by the plaintiff. The learned Counsel for the appellant thereafter submitted that relying upon the evidence of Court Commissioner in absence of any other evidence on behalf of the plaintiff was also not proper on the part of the trial court as it amounted to collection of evidence. In my considered view, when the Court holds that proper steps are required to be taken and

direction is to be issued to assist the Court, which appears to have been done in this case and, therefore, I do not see any reason why any fault should be found with the trial court in appointment of Court Commissioner. The evidence of the Court Commissioner was relied upon in order to come to a particular conclusion by trial court. In any case, the point raised in that regard appears to be question of facts which can not be raised at this stage.

It was further submitted that the sale deed upon which the plaintiff has rested his claim is dated 30/04/1994 and such sale deed was declared null and void by the court of law. However it is also apparent from the record that the judgment and decree declaring the said judgment null and void is stayed and matter is subjudice. Further, as the matter stands today, the sale deed can not be said to be null and void and therefore title of the plaintiff rested upon the said sale deed as on today is good in law. Therefore the said point also cannot be agitated in the second appeal.

8. In this regard one must note the observations made by the Supreme Court in the Case of **Kondiba Dagadu Kadam Versus Savitribai Sopan Gujar and Ors.** (1999 3 SCC 722) wherein it is observed that the concurrent findings of facts howsoever erroneous, can not be disturbed by

the High Court in exercise of the powers under Section 100 of Civil Procedure Code, and in this particular case there is no question of recording erroneous findings but in fact both the courts have appreciated the evidence in its proper perspective and therefore no interference at all is required. As a result the appeal stands dismissed with no order as to costs. Consequently Civil Application No. 294/2005 is dismissed with no order as to costs.

P.V. KAKADE, J.

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